Supreme Court, U.S.
FILED

No. 1

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

John S. Skuratowicz
Officer of Monex Corporation

Petitioner,

vs.

Roger W. Tracy
Tax Commissioner of Ohio

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

John S. Skuratowicz
5617 Linworth Road
Columbus, OH 43235-3301
(614)888-9721
Petitioner Pro Sé

47 pp

QUESTION FOR REVIEW

1. Whether the State of Ohio erroneously prohibited Petitioner from presenting evidence as to the inaccuracy of various assessments by the State of Ohio's Tax Commissioner upon Monex Corporation, thereby depriving Petitioner, a former officer of Monex Corporation, of due process under the law and in contravention of the Constitution of the United States of America.

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28 U.S.C. 1257 1

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Fourteenth Amendment 2,6,7,8

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Appendix A ---- Board of Tax Appeals Opinion Filed October 8, 1997 ..... A-1

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OPINIONS BELOW

The opinion of the Supreme Court of Ohio (App., infra) is reported at 80 Ohio State 3d 52. The opinions of the State of Ohio Board of Tax Appeals (App., infra) are unreported.

STATEMENT OF JURISDICTION

The Supreme Court of Ohio entered its judgment on October 8, 1997 (App., infra). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken

> for public use, without just compensation.

The Fourteenth Amendment to the Constitution (Section 1) provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. The State Court Decision

This case first initiated as a result of a Notice of Appeal Petitioner filed with the Ohio Board of Tax Appeals on November 22, 1994 as to two final determinations of the Tax Commissioner dated October 31, 1994. In those determinations by the Tax Commissioner, he affirmed his findings that Petitioner was an officer liable for unpaid sales tax of Monex Corporation for the period of January 1983 through June 1986,

an amount including interest and penalties now determined to be in excess of $500,000.00.

A hearing was subsequently held before the Ohio Board of Tax Appeals on January 25, 1996 to determine whether Petitioner was a corporate officer responsible for filing state sales taxes for Monex Corporation. On November 15, 1996, the Board of Tax Appeals issued its Decision and Order wherein it ruled that, with respect to Petitioner's appeal of the two final determinations, it found that Petitioner was liable for the corporation's failure to file state sales tax returns from the Graceland store. The Board also found that Petitioner was not liable for the unpaid state sales tax of Ohio National Coin Exchange. It was from the Board's November 15, 1996 Decision and Order that Petitioner filed his Notice of Appeal to the Ohio Supreme Court on December 13, 1996.

On October 8, 1997 the Supreme Court of Ohio issued its decision wherein it determined that Petitioner's argument that he had been denied due process with respect to his ability to challenge the underlying corporate assessment at the Board of Tax Appeals Hearing was unfounded in that Petitioner had failed to list in his notice of appeal to the Board of Tax Appeals that he planned to challenge the underlying assessment. It is from this decision by the Ohio Supreme Court that Petitioner has requested a Writ of Certiorari from the United States Supreme Court as to his constitutional protections afforded to him under the United States Constitution.

II. The Facts

Petitioner was a Corporate Officer in Monex Corporation, an Ohio corporation that was engaged in the buying and selling of coins, stamps, bullion, diamonds and sterling flatware. Monex operated three locations in the

Columbus, Ohio area: Graceland Coin and Stamp, Ohio National Coin Exchange and Franklin International. When Monex was incorporated in 1980, the Chairman of the Board was one Douglas Ritchie. Mr. Ritchie owed 45% of the corporate shares and the Petitioner also owned 45% of the corporate shares. The remaining 10% was owned by a third person. The policy, for collection of state sales tax, as established by Mr. Ritchie, acknowledged that the company would collect the state sales taxes, that the managers and employees at each store would be responsible for sending in the state sales taxes collected from each store respectively. Thus, it was the employees' responsibility to see that the state sales taxes were properly collected so that they could be paid to the State of Ohio, Department of Taxation. With respect to the Graceland shop, Petitioner was primarily involved in those transactions that occurred as a result of sales at coin shows, outside of the store, and with some dealers with whom he had become familiar and with whom he was directly involved in transacting business. With regard to these particular sales Petitioner would, in fact, be responsible for collection of the taxes and did, in fact, send in the sales tax forms in an amount that was so required.

In August of 1986, Monex Corporation became defunct and ceased to continue to do business as a corporation. Thereafter, Petitioner was notified by the Ohio Department of Taxation that they would conduct an audit of Monex Corporation. After performing said audit, the State of Ohio Department of Taxation indicated that it would issue corporate assessments for sales tax liability of Monex Corporation. Thereafter, Petitioner attended hearings with respect to Monex Corporation as he was the only corporate officer available to do so. Petitioner, acting without counsel during this time, was never made aware by the Ohio Board of Tax Appeals of the fact that a valid assessment against Monex Corporation could

ultimately become the liability of a Corporate Officer. Thus, the Petitioner, knowing only that Monex Corporation had no assets and no ability to attain assets to pay the tax in the future, did not comprehend that the corporate liability would one day become his own, as a former officer of Monex Corporation.

It was not until May of 1995, when Petitioner sought counsel, that he fully began to understand and comprehend the seriousness of his potential personal liability regarding same. Thereafter, Petitioner reviewed all of the audit documentation prepared by the State and prepared his responses in rebuttal of same for a subsequent hearing before the Board of Tax Appeals. The review of said documentation by Petitioner revealed to him that the audit as performed by Tax Commissioner personnel was erroneously prepared and exaggerated any sale taxes actually due the State of Ohio. Thereafter, Petitioner was prohibited from entering his evidence as to the credibility of the underlying corporate assessment at the hearing before the Ohio Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

I. Due Process Requires That A Government Entity Give An Individual the Opportunity to Attack the Credibility of an Underlying Corporate Assessment Where Liability for Same May Become That of the Individual.

This Court has constantly held that a fair trial in a fair tribunal is a basic requirement of due process. In *Re Murchison* (1955) 349 U.S. 133. The Constitutional provisions of both federal and state hold that no person shall be deprived of life, liberty or property without due process of law are the most essential guarantee of the security of our liberties and the stability of our law. *State , ex rel.* H*oel v. Brown* (1922) 105 Ohio St. 479. The Fifth Amendment of the United States

Constitution declares that "no person shall be deprived of life, liberty or property without due process of law," and the Fourteenth Amendment declares that "no state shall deprive any person of life, liberty or property without due process of law." This requirement applies to agencies and government hearing officers as well as judges. *Withrow v. Larkin* (1975) 421 U.S. 35.

Furthermore, it has been held that the official conduct of every government agency, legislative, executive and judicial, toward every person must comply with the test of due process of law. *Cowen v. State* (1920) 101 Ohio St. 387. While the Constitutional guarantee of due process of law protects property rights, it is not a guarantee against deprivation of property, only against deprivation of property without due process of law. *Phillips v. State* (1907) 77 Ohio St. 214.

Generally, the rights embraced in procedural due process can be reduced to the single requirement of an opportunity to be heard. *New York Central Railroad Co. V. Public Utilities Commission* (1936) 130 Ohio St. 548. Procedural due process seeks to prevent a government from arbitrarily depriving a person of his property. *Sensenbrenner v. Crosby* (1974) 37 Ohio St. 2d 43. In pursuance of the rule that the right to a hearing is essential under the due process of law, what is required is an orderly proceeding in which the person sought to be affected has the opportunity to defend, enforce and protect his rights upon equal terms with the party instituting the proceeding. *State, ex. rel. Wright v. Morrison* (1947) 80 Ohio App. 135. A full hearing is one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the proprietary or impropriety from the standpoint of justice and law of one step asked to be taken. *State , ex rel. Wright v. Morrison, supra.*

In the instant case, Petitioner was not afforded due process of law under the Ohio Constitution or under the Fifth or Fourteenth Amendments of the Constitution of the United States of America. Petitioner was afforded a hearing in which he was not allowed to provide the evidence necessary for a determination to be made that the underlying corporate assessments which were at issue were erroneous. The proffered testimony and exhibits of Petitioner would have demonstrated that the assessments by the Tax Commissioner were erroneous. To deny Petitioner the opportunity, to attack the basis for the State's assessments at a hearing in which the issue to be determined was whether he would be responsible as an individual for the substantial amount in question, was a patent denial of due process of law.

The Ohio Supreme Court stated in its opinion that a taxpayer must specify error in the notice of appeal to the Board of Tax Appeals for the Board of Tax Appeals to have jurisdiction over the error. Specifically, the Ohio Supreme Court determined that the Board of Tax Appeals had no jurisdiction to consider the challenge of the underlying assessment because Petitioner did not list in his notice of appeal to the Board of Tax Appeals that he planned to challenge the underlying assessment. However, this determination was not stated by the Board of Tax Appeals in its decision of November 15, 1996. In fact, in that decision the Board of Tax Appeals determined that Petitioner had met his duty of specificity with respect to his notice of appeal. Actually, the State had sought to have Petitioner's appeal dismissed with a motion filed with the Board of Tax Appeal, which the Board ruled upon on October 27, 1995. In that decision the Board of Tax Appeals found that Petitioner had met the specificity necessary for his appeal of the assessments. In his appeal Petitioner had indicated that the Tax Commissioner at the Board of Tax Appeals had deprived him of due process of law. The basis for

the Board of Tax Appeal's determination that Petitioner was prohibited from providing evidence as to the credibility of the corporate assessment was stated to be *Rown v. Kohn*, (1976) 48 Ohio St. 2d 311, wherein the Ohio Supreme Court ruled as follows:

> *"Clearly Appellee's liability for the overdue sales tax is derivative in nature. The separate identities of corporation and officer are thus irrelevant in this context. Once the assessment against the Corporation becomes conclusive by the failure to present objections thereto the officer is bound by the oscitancy of his corporation" (Id at 373).*

Thus, it is clear that the Ohio Supreme Court formulated a basis for denial of Petitioner's ability to challenge the underlying assessment that the Board of Tax Appeals did not. The Ohio Supreme Court held that Petitioner held that Petitioner did not meet his burden of specificity as to the constitutional issues in Petitioner's appeal. Yet the Board of Tax Appeals found that Petitioner's Notice of Appeal, which included a statement as to the deprivation of due process or law, met the specificity arguments necessary for a valid appeal. The Board of Tax Appeals merely prohibited Petitioner from attacking the underlying corporate assessment based upon prior case law. (*Rown v. Kohnn*, supra)

As previously stated, the Fifth and Fourteenth amendments to the Constitution require that the Petitioner be given an opportunity to attack the credibility of evidence utilized against him. In the instant case Petitioner was not afforded said opportunity, and for this reason this Honorable Court should issue a Writ of Certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

John S. Skuratowicz, Pro Sé
5617 Linworth Road
Columbus, OH 43235-3301

APPENDIX A

APPEAL FROM THE
BOARD OF TAX APPEALS
FILED OCTOBER 8, 1997

THE SUPREME COURT OF OHIO

John S. Skuratowicz, Officer of Monex Corporation,	:	1997 TERM
	:	Case No. 96-2751
	:	
Appellant,	:	JUDGMENT ENTRY
v.	:	
Roger W. Tracy, Tax Commissioner of Ohio	:	
	:	APPEAL FROM THE
Appellee.	:	BOARD OF TAX APPEALS

This cause, here on appeal from the Board of Tax Appeals, was considered in the manner prescribed by law. On consideration thereof, the decision of the Board of Tax Appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the Appellee recover from the Appellant his costs herein expended; and that a mandate be sent to the Board of Tax Appeals to carry this judgment into execution; and that a copy of this entry be certified to the Board of Tax Appeals for entry.

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COSTS:

Docket Fee, $40.00, paid by Bailey and Slavin.

(Board of Tax Appeals; No. 94T1510)

s/THOMAS J. MOYER
Chief Justice

APPENDIX A

00 Ohio St.3d] SKURATOWICZ v. TRACY
Statement of the Case

SKURATOWICZ, OFFICER OF MONEX CORPORATION, APPELLANT,
v. TRACY, TAX COMMR., APPELLEE

[Cite as *Skuratowicz v. Tracy (1997), ---- Ohio St.3d ----.*]

Taxation--Sales tax---President and majority shareholder of corporation personally liable for sales tax assessments, when --R.C. 5739.33, applied.

(No. 96-2751 — Submitted July 22, 1997 — Decided October 8, 1997.)

APPEAL from the Board of Tax Appeals, No. 94-T-1510.

John S. Skuratowicz, appellant, was the president and majority shareholder of Monex Corporation. Monex purchased and operated the Graceland Coin & Stamp store in Columbus. The store bought and sold precious metals, collectibles, and stamps.

As president of Monex, Skuratowicz hired, trained, and evaluated store employees. Skuratowicz, who spent much of his time away from the store at coin shows, managed the store under a policy, established by a former co-principal of Monex, that the store clerks were responsible for obtaining exemption certificates on purchases or collecting sales tax. Evidently, the store

clerks, who were high-school, distributive education students, did not execute this policy acceptably. Consequently, the Tax Commissioner, appellee, issued a sales tax assessment against Monex for $310,267.19, plus penalty, for the audit period of January 1983 through June 1986.

Monex's business failed and it was dissolved. The commissioner, nevertheless, issued an assessment against Skuratowicz as a responsible corporate officer of Monex. According to the testimony, Skuratowicz performed the accounting operations for Monex, including preparing and signing sales tax returns. During the audit period, he was the only individual holding check-signing authority.

On appeal, the Board of Tax Appeals ("BTA") found:

> "*** As president, Mr. Skuratowicz had authority over the general business operations, as well as over Monex's employees. He had the authority to hire and fire employees, and he participated in the training of the employees. Further, he engaged in the periodic review of employee performance. Regardless of the role the student-workers had in handling the sales transactions, it is Mr. Skuratowicz who had the responsibility for seeing that Monex's sales tax obligations were satisfied."

APPENDIX A

The BTA continued:

> "* * * He kept the books, and saw that the sales tax forms were prepared and filed. Given our review of Mr. Skuratowicz's entire relationship to Monex and the Graceland store, we find that the record supports a conclusion that Mr. Skuratowicz is among the class of officers who can be held accountable for a corporation's failure to file sales tax returns and/or to remit the tax when due."

Accordingly, the BTA affirmed the commissioner's order assessing Skuratowicz for the liability of the Graceland store, as reduced by the commissioner's prior recalculation of the underlying corporate assessment.

The matter is before this court upon an appeal as of right.

Bailey & Slavin and *Richard C. Slavin*, for appellant.

Betty D. Montgomery, Attorney General, and *Richard C. Farrin*, Assistant Attorney General, for appellee.

APPENDIX A

Per Curiam. R.C. 5739.33 imposes personal liability on a responsible corporate officer for a corporation's sales tax. During the audit period in question, it read:

> "If any corporation required to file returns and to remit tax due to the state under the provisions of sections 5739.01 to 5739.31, inclusive, of the Revised Code, fails for any reason to make such filing or payment, any of its officers, or employees having control or supervision of or charged with the responsibility of filing returns and making payments, shall be personally liable for such failure. The dissolution of the corporation shall not discharge an officer's or employee's liability for a prior failure of the corporation to file returns or remit tax due. The sum due for such liability may be collected by assessment in a manner provided in section 5739.13 of the Revised Code." (132 Ohio Laws, Part I, 2029.)

Skuratowicz argues that the corporate policy, directing the employees to collect the sales tax or obtain the customer's signature on an exemption certificate, shields Skuratowicz from liability. The commissioner replies that Skuratowicz is exactly the type of person R.C. 5739.33 renders liable for the corporation's sales tax. The commissioner is correct.

In *Spithogianis v. Limbach* (1990), 53 Ohio St.3d 55, 559 N.E.2d 449, Spithogianis, the president of the

taxpayer corporation, had authority to oversee the operations of the corporation. He spent only one or two days per month doing this, so he hired a consultant to direct the corporation's daily operations. Spithogianis also authorized the consultant to approve all corporate checks. Spithogianis participated in some of the corporation's operations but generally delegated responsibility for filing sales tax returns and paying the tax to other corporate employees. The BTA found that Spithogianis was not liable because he delegated the tax collection and remission duties to others throughout the audit period.

We, however, reversed the BTA's decision and held Spithogianis liable for the corporate assessment. We said, 53 Ohio St.3d at 57, 559 N.E.2nd at 451:

> "The General Assembly intended, through the enactment of R.C. 5739.33, to hold those officers or employees who are in charge of the operations of the defaulting corporation personally liable for unpaid sales tax, if such persons filed returns or paid taxes, or controlled or supervised those others who performed those tasks, or had responsibility to such tasks. R.C. 5739.33 does not permit responsible officers or employees to escape liability by delegating those duties to others." Accord *McGlothin v. Limbach* (1991), 57 Ohio St.3d 72, 565 N.E.2d 1276.

APPENDIX A

Skuratowicz had the duty to see that Monex's employees collected the correct amount of sales tax from Monex's customers and remitted the correct amount to the state. Since he failed in his duty, R.C. 5739.33 renders him personally responsible for Monex's tax liability.

Skuratowicz also argues that the BTA denied him due process. He claims the BTA did not permit him to challenge the underlying corporate assessment. Skuratowicz, however, did not list in his notice of appeal to the BTA that he planned to challenge the underlying assessment.

Under R.C. 5717.02, a taxpayer must specify error in the notice of appeal to the BTA for the BTA to have jurisdiction over the error. *Kern v. Tracy* (1995), 72 Ohio St.3d 347, 650 N.E.2d 428. Thus, the BTA had no jurisdiction to consider the challenge to the underlying assessment. Hence, the BTA could not deny Skuratowicz due process for a claim that Skuratowicz did not ask the BTA to process.

Finally, Skuratowicz claims error over the uncertain amount of his assessment. The amount is uncertain because the Monex assessment had been reduced on appeal by the corporation (BTA No. 87-H-976). The BTA correctly resolved the dilemma over how much Skuratowicz should pay when, in this case, it ordered the commissioner to change Skuratowicz's assessment amount to the reduced, underlying assessment amount of the corporation.

APPENDIX A

Accordingly, we affirm the BTA's decision because it is reasonable and lawful.

Decision affirmed.

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER, COOK AND LUNDBERG STRATTON, JJ., concur.

APPENDIX B

DECISION AND ORDER
FILED OCTOBER 15, 1996

OHIO BOARD OF TAX APPEALS

John S. Skuratowicz, Officer of Monex Corporation,	)	CASE NO. 94-T-1510
Appellant,	)	
vs.	)	(OFFICER LIABILITY)
Roger W. Tracy, Tax Commissioner of Ohio,	)	
Appellees.	)	DECISION AND ORDER

APPEARANCES:

For the Appellant - Richard C. Slavin
Attorney at Law
6877 North High Street
Suite 303
Worthington, Ohio 43085

For the Appellee Betty D. Montgomery
Attorney General of Ohio
By: Richard C. Farrin
Assistant Attorney General
State Office Tower, 16th Floor
30 East Broad Street
Columbus, Ohio 43215

APPENDIX B

This matter is before the Board of Tax Appeals pursuant to a notice of appeal filed under date of November 22, 1994, by appellant, John S. Skuratowicz. Mr. Skuratowicz appeals from two final determinations of the Tax Commissioner dated October 31, 1994. Therein, the Tax Commissioner affirmed his findings that Mr. Skuratowicz is an officer liable for the unpaid sales tax of Monex Corporation ("Monex") for the period of January 1983 through June 1986, designated Assessment Number 87601084, and the periods of August 1985, February 1986, and August 1986, designated Assessment Number 87601101.

The Board of Tax Appeals now considers this matter upon the notice of appeal, the statutory transcript certified to the Board by the Tax Commissioner, the briefs filed by the parties, and the record of the evidentiary hearing. At the hearing, Mr. Skuratowicz was represented by counsel, who offered Mr. Skuratowicz's testimony and several documents in support of Mr. Skuratowicz's contentions of error. The Tax Commissioner was also represented by counsel, who moved the Board to affirm the Tax Commissioner upon the record.

The procedural history surrounding this appeal is unusual. We believe it would be beneficial to our discussion to review the procedural history before we consider the merits of this appeal. Monex has been involved in considerable litigation over a prior sales tax assessment issued by the Tax Commissioner. On September 11, 1987, Monex filed an appeal with this Board, designated as Case No. 87-H-976, challenging the corporate

assessment. We issued a decision and order in that case on June 25, 1993, wherein we modified the Tax Commissioner's determination with respect to certain items. Following an unsuccessful appeal to the Ohio Supreme Court, we remanded the case to the Tax Commissioner, ordering him to recompute the assessment based upon our decision. On or about February 2, 1994, the Tax Commissioner issued a final determination based upon our order.

Under date of March 10, 1994, Mr. Skuratowicz filed, in his own name, a purported appeal from the February determination, which was docketed as BTA Case No. 94-H-266. Thereafter, under date of November 22, 1994, a document identified as an "amended appeal" was filed, referencing Case No. 94-H-266. Attached to that document were copies of the final determinations from the officer assessments, Nos. 87601084 and 87601101.

On October 27, 1995, this Board dismissed the Monex claims raised in Case No. 94-H-266 because the notice of appeal had not been filed within thirty days of the Tax Commissioner's determination, as required by R.C. 5717.02, and because Mr. Skuratowicz had filed the notice as an individual and not on behalf of Monex. Skuratowicz v. Tracy (Oct. 27, 1995), BTA Case No. 94-H-266, unreported, affirmed (1996), 76 Ohio St. 3d 103. However, we recognized that the officer liability issues raised in the document filed on November 22, 1994, constituted a separate and properly filed appeal before the Board. We therefore split the officer liability assessments from the

appeal involving the corporate assessment and designated it as Case No. 94-1510, the appeal presently before us.

Initially, the Tax Commissioner asks us to reconsider the part of the October 27, 1995, decision that retained jurisdiction over the officer liability assessments. In reaching our original determination, we found the following:

> "We consider that the 'amended appeal' filed November 22, 1994, did properly appeal the two final determinations dated October 31, 1994, wherein Appellant was determined to be a responsible officer of Monex Corporation. It was obviously timely, and we believe the attachment of the October 31 final orders and the mention of the officer liability cases in the 'memorandum' attached to the 'amended appeal' (see paragraph 4) satisfies the specificity requirements of Moraine Hts. Baptist Church v. Kinney [(1984), 12 Ohio St. 3d 134] and Queen City Valves, Inc. v. Peck [(1954), 161 Ohio St. 579]." Skuratowicz, supra, at 6.

Upon review of the record in this matter, we find no cause to deviate from our original determination.

Therefore, the Tax Commissioner's request to dismiss this appeal is again denied.

APPENDIX B

The underlying corporation, Monex, was an Ohio corporation engaged in the buying and selling of coins, stamps, bullion, diamonds, and sterling flatware. Monex operated three locations: Graceland Coin and Stamp (Vendor's License 25-202996), Ohio National Coin Exchange (Vendor's License 25-188856), and Franklin International Investments (Vendor's License 25-210394). The officer liability assessments, however, cover only unpaid sales tax related to the Graceland and Ohio National locations; they do not include the Franklin Investments location.

When Monex was incorporated in 1980, Mr. Skuratowicz owned forty-five percent of the corporate shares. Forty-five percent of the shares were owned jointly by another investor and the investor's wife. The remaining ten percent was owned by a third person. However, Mr. Skuratowicz testified that the corporation repurchased the forty-five percent of stock from the investor and his wife, leaving Mr. Skuratowicz as the majority shareholder.

Mr. Skuratowicz was the President of Monex. Although the corporation had other officers, Mr. Skuratowicz testified that these officers were not active in the corporation. During the periods covered by the assessment, Mr. Skuratowicz testified that he prepared, signed, and filed all of Monex's tax returns, including those for franchise and sales tax. He kept the corporation's books and records. He was also the sole individual authorized to

sign checks on Monex's account.[1] Mr. Skuratowicz was also Monex's statutory agent and the sole officer listed on the dissolution documents filed with the Secretary of State.

Before reviewing Mr. Skuratowicz's contentions of error, we observe that the findings of the Tax Commissioner are presumptively valid. Consequently, it is incumbent upon a taxpayer challenging a determination of the Tax Commissioner to rebut that presumption. Alcan Aluminum Corp. v. Limbach (1989), 42 Ohio St. 3d 121. When no competent and/or probative evidence is developed and properly presented to the Board to establish the Tax Commissioner's determination as being "clearly unreasonable or unlawful," the determination is presumed to be correct. Id.

Mr. Skuratowicz first raises several issues concerning the amounts included in the underlying corporate assessments. At hearing, however, our attorney examiner properly ruled that such claims are not proper for consideration in actions involving derivative liability under

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[1] Mr. Skuratowicz further testified that another shareholder and officer, Douglas Ritchey, was also authorized to sign checks until he sold his interest in Monex in May of 1982. Thereafter, Mr. Skuratowicz was the only signatory on the account.

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R.C. 5739.33. In Rowland v. Collins (1976), 48 Ohio St. 2d 311, the Supreme Court ruled as follows:

> "Clearly, appellee's liability for the overdue sales tax is derivative in nature. The separate identities of corporation and officer are thus irrelevant in this context. Once the assessment against the corporation becomes conclusive by the failure to present objections thereto the officer is bound by the oscitancy of his corporation." Id. At 313.

We do observe that Monex presented objections to the corporate assessment in Monex Corporation v. Limbach (June 25, 1993), BTA Case No. 87-H-976, unreported. As previously stated, we modified the Tax Commissioner's determination and remanded the matter to the Tax Commissioner to recalculate the assessments accordingly. The Tax Commissioner's recalculation was appealed to this Board, which dismissed the appeal. Skuratowicz, BTA Case No. 94-H-266, supra. Thus, issues involving the underlying assessments have been previously addressed and resolved. They may not be raised anew in the present matter.

Mr. Skuratowicz next argues that the assessments against him are incorrect because the amounts reflect the original corporate assessment rather than the reduction ordered in BTA Case No. 87-H-976. At hearing, counsel

for the Tax Commissioner stated that the officer liability assessment reflected the amounts levied in the original audit because litigation on the underlying corporate assessment was still pending before the Supreme Court. Subsequent to the hearing, however, the Court issued its determination in Skuratowicz v. Tracy (1996), 76 Ohio St. 3d 103. As the amount of the corporate assessment has become conclusive, the Tax Commissioner should now be able to provide to Mr. Skuratowicz an updated assessment which reflects the reduction in the underlying corporate liability.

As previously noted, this appeal involves two final determinations. The first involves the Graceland location, Assessment No. 87601084, and the second concerns the Ohio National location, Assessment No. 87601101. To better review the remainder of Mr. Skuratowicz's contentions, we shall consider each assessment separately.

Graceland Coin and Stamp

For the Graceland location, Mr. Skuratowicz was assessed personal liability in the amount of $356,807.24, including penalties.[2] See Assessment No. 87601084. The assessment covers the period of January 1983 through June

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[2] Again, we note that the amount levied will be adjusted based upon the Tax Commissioner's subsequent recalculation.

APPENDIX B

1986. Mr. Skuratowicz asserts that he cannot be held liable for Graceland's unpaid sales tax because he was not the individual responsible. At hearing, Mr. Skuratowicz testified that he did not spend much time dealing with the store's customers. Instead, he would travel to various trade shows and deal with certain, high volume clients. Managers were hired to supervise the store's sales staff. This staff was composed mostly of high school students who were involved in a "distributive education program." Mr. Skuratowicz was involved in the hiring of these students, and was also responsible for the periodic review of the students. These reviews would be used by the school to evaluate the students' performance.

Mr. Skuratowicz argues that he is not liable for the sales tax because the student-workers were the individuals responsible for making the sales. Mr. Skuratowicz reasons that the student-workers were therefore charged with the duty for seeing either that the proper sales tax was collected on the sale or that the appropriate sales tax exemption was provided by the customer. The Tax Commissioner counters that liability is not necessarily determined based upon who has the responsibility to collect the tax from the purchasers but upon who has control or supervision over the filing of returns and the remittance of the tax. We agree with the Tax Commissioner.

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The subject assessment was issued pursuant to R.C. 5739.33. During the period covered by the assessment, R.C. 5739.33 read as follows:

> "If any corporation or business trust required to file returns and to remit tax due to the state under the provisions of this chapter fails for any reason to make the filing or payment, any of its employees having control or supervision of or charged with the responsibility of filing returns and making payments, or any of its officers or trustees who are responsible for the execution of the corporation's or business trust's fiscal responsibilities, shall be personally liable for the failure. The dissolution, termination, or bankruptcy of a corporation or business trust shall not discharge a responsible corporate officer's, employee's or trustee's liability for a failure of the corporation or business trust to file returns or remit tax due. The sum due for the liability may be collected by assessment in the manner provided in section 5739.13 of the Revised Code."

The above language clearly indicates that liability is not contingent solely upon who actually collects tax from a purchaser of taxable goods and services. Generally, R.C.

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5739.33 is intended "to hold those officers or employees who were in charge of the operations of a defaulting corporation personally liable for unpaid sales tax if such persons filed returns or paid taxes, or controlled or supervised others who performed those tasks, or had responsibility for such tasks." Spithogianis v. Limbach (1990), 53 Ohio St. 3d 55 at 57. Thus, R.C. 5739.33 is not intended to include all corporate officers and employees but only those persons who have a specific connection with the preparation, filing, and/or payment of sales tax returns. Weiss v. Porterfield (1971), 27 Ohio St. 2d 117.

In the instant matter, Mr. Skuratowicz has admitted that he was the person responsible for the preparation, signing, and filing of Monex's sales tax returns. He was also the only person who could remit those taxes, as he had sole authority to issue checks. Mr. Skuratowicz was the majority shareholder during the assessed periods. As President, Mr. Skuratowicz had authority over the general business operations, as well as over Monex's employees. He had the authority to hire and fire employees, and he participated in the training of employees. Further, he engaged in the periodic review of employee performance. Regardless of the role the student-workers had in handling the sales transactions, it is Mr. Skuratowicz who had the responsibility for seeing that Monex's sales tax obligations were satisfied.

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Additionally, the fact that Mr. Skuratowicz may have been absent from the Graceland location does not preclude his ultimate liability. In Spithogianis, supra, the Court considered a situation in which the assessed person was an officer, a majority shareholder of the corporation, and had the ability to hire and fire officers and accountants. The officer, however, had delegated the day-to-day running of the corporation to a business manager. While retaining check writing privileges, the officer spent only one to two days per month overseeing the corporation's operations. In upholding the officer assessment, the Court held that the delegation of the preparation of sales tax returns and payment constituted the control requisite to find the officer liable.

The Supreme Court has reiterated this position in McGlothin v. Limbach (1991), 57 Ohio St. 3d 72, wherein the officer was a professional model who resided in New York City. As a result of his absence from Ohio, he participated in the corporation's activities on an infrequent basis and hired a family member to handle the day-to-day operations and accounting functions. The Court found that the officer's authority to control and supervise those responsible for sales tax return preparation and the remittance of the tax satisfied the requirements of R.C. 5739.33, even if such control was not actually exercised. The fact that the officer was the principal shareholder with the ability to hire and fire employees provided the Tax Commissioner with a sufficient basis for imposing personal

liability. See, also, Lenart v. Lindley, (1980), 61 Ohio St. 2d 110 (responsible persons include those officers and employees who are aware of the corporation's duty to remit all tax proceeds collected and who possess the authority to issue checks); Kubicki v. Limbach (1991), 62 Ohio St. 3d 320 (it is not necessary for a corporate officer to exercise actual financial control in order to be held liable under R.C. 5739.33); and DeLassus v. Tracy (1994), 70 Ohio St. 3d 218 (R.C. 5739.33 is broad in its scope and encompasses those officers who, by virtue of their ownership, title, and authority, possess the requisite responsibility to be held liable).

Here, Mr. Skuratowicz maintained a supervisory role in the Graceland operation. He monitored employee performance. He kept the books, and saw that the sales tax forms were prepared and filed. Given our review of Mr. Skuratowicz's entire relationship to Monex and the Graceland store, we find that the record supports a conclusion that Mr. Skuratowicz is among that class of officers who can be held accountable for a corporation's failure to file sales tax returns and/or remit the tax when due.

Ohio National Coin Exchange

Mr. Skuratowicz was assessed $3,683.94, including penalties and additional charges, for the unpaid sales tax of the Ohio National Coin Exchange. See Assessment No.

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87601101. The assessment covers the periods of August 1985, February 1986, and August 1986. Mr. Skuratowicz claims that he cannot be held liable for the sales tax of the Ohio National Coin Exchange location because that location was sold in 1982. The Tax Commissioner counters that a valid vendor's license for Ohio National was maintained in Monex's name until canceled in 1986.

At hearing, Mr. Skuratowicz submitted into evidence a "Bill of Sale" dated April 1, 1982. (Appellant's Exhibit 1.) This document indicates that Monex transferred all of Ohio National's assets to Douglas Ritchey. Mr. Skuratowicz testified that Mr. Ritchey had been a shareholder in Monex. In 1982, Mr. Ritchey decided to sell his interest. In exchange for his shares, the corporation transferred Ohio National to Mr. Ritchey. Mr. Skuratowicz testified that he had no involvement with the Ohio National location after the sale, he had no knowledge of what Mr. Ritchey's business practices were, nor was he aware of information related to Ohio National's sales tax obligations.

After review of the record, we find that Mr. Skuratowicz is not an officer liable under R.C. 5739.33 for the unpaid sales tax of Ohio National. For the periods in issue, neither Monex nor Mr. Skuratowicz had any ownership interest in the store. Mr. Skuratowicz had no supervisory role in the store, he did not participate in the

keeping of the store's books or in the preparation of its sales tax returns; and, he had no control over any aspect of the business operations. In this instance, we do not find the mere fact that there was a valid vendor's license in Monex's name to be determinative of personal liability. There is no evidence in the record to suggest that Monex was using this license to make sales under the name of Ohio National. If Mr. Ritchey continued the unauthorized use of the vendor's license, then the responsibility for the tax might well be upon him, rather than Mr. Skuratowicz. But see Jacobs v. Tracy (June 7, 1996), BTA Case No. 94-T-1504, unreported, and Drago v. Tracy (Jan. 14, 1994), BTA Case No. 92-A-945, unreported (sellers of businesses, under executory contracts, held liable for sales tax incurred by the purchasers who operated the premises under a management agreement). Based upon the foregoing, we find that Mr. Skuratowicz is not among that class of individuals who may be held liable for the unpaid sales tax of Ohio National Coin Exchange.

Conclusion

In conclusion, we find the Tax Commissioner's final determination with respect to Mr. Skuratowicz's liability for the sales tax of Graceland Coin and Stamp to be supported by the evidence and to be in accordance with law. It is therefore the decision and order of the Board of Tax Appeals that Assessment No. 87601084 must be, and the same hereby is, affirmed. It is further ordered that the Tax

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Commissioner, within THIRTY (30) days of the issuance of this decision and order, provide an accounting to Mr. Skuratowicz that reflects the Tax Commissioner's recalculation of the underlying corporate assessment.

We further find that Mr. Skuratowicz has met his burden of showing that the Tax Commissioner's determination with respect to Mr. Skuratowicz's liability for Ohio National Coin Exchange is clearly erroneous. Therefore, it is the order of the Board of Tax Appeals that Assessment No. 87601101 must be, and the same hereby is, reversed.

I hereby certify the foregoing to be a true and correct Copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.

s/Kiehner Johnson
Chairman

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DECISION AND ORDER
FILED OCTOBER 27, 1995
OHIO BOARD OF TAX APPEALS

John S. Skuratowicz,	)	
	)	
Appellant,	)	CASE NO. 94-H-266
	)	
vs.	)	SALES TAX
	)	
Roger W. Tracy, Tax Commissioner of Ohio,	)	DECISION AND ORDER
	)	
Appellee.	)	

APPEARANCES:

For the Appellant -
Richard C. Slavin, Esq.
Bailey and Slavin
6877 North High Street
Suite 303
Worthington, Ohio 43085

For the Appellee -
Betty D. Montgomery, Esq.
Attorney General of Ohio
By: Richard C. Farrin, Esq.
Assistant Attorney General
State Office Tower
16th Floor
30 East Broad Street
Columbus, Ohio 43215

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This cause and matter comes on to be considered upon a Motion to Dismiss Appeal filed June 29, 1995 by counsel for the Tax Commissioner. Appellant filed a memorandum in opposition to the motion to dismiss, to which Appellee filed a response.

The facts surrounding the instant appeal and the motion to dismiss are convoluted and not easily stated. Until present counsel for Appellant entered his appearance, at the May 12, 1995 hearing on the motion to dismiss, Appellant represented himself in this matter.

The initial appeal, 94-H-266, was instituted by the filing of a document entitled "appeal" on March 10, 1994. That document bore a case number 87-H-976. Our case number 87-H-976 was a sales tax case involving Monex Corporation, a corporation of which Appellant was principal and president. We issued our Decision and Order in that case on June 25, 1993, and, following an unsuccessful appeal to the Ohio Supreme Court, we remanded the matter to the Tax Commissioner to recompute the assessment based on the determination made in our decision. It is our understanding that on or about February 2, 1994, the Tax Commissioner made a final determination on that remand. We have not been furnished a copy of that final order, but counsel for the Tax Commissioner stated that to be the case.

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Upon examination of the "appeal" filed March 10, 1994, it was difficult to determine exactly what was being appealed. The case number therein enumerated, 87-H-976, was inappropriate even if the February 2, 1994 decision by the Tax Commissioner on remand was being appealed since, if that decision was appealed, it would initiate a new case before the Board of Tax Appeals.

The original "appeal" itself in 94-H-266 states Appellant is appealing "any and all assessments, assignations (sic) and assignments upon John S. Skuratowicz." This is clearly inadequate --- see the "specificity" requirements enumerated in such cases as Queen City Valves, Inc. v. Peck (1954), 161 Ohio St. 579 and Moraine Hts. Baptist Church v. Kinney (1984), 12 Ohio St. 3d 134. Looking at the body of the appeal, entitled Memoranda and Supportive Facts, the confusion continues. In the portion entitled "Memoranda" Appellant discusses the sales tax assessment against Monex Corporation (involved in 87-H-976), while in the "Supportive Facts" Appellant discusses facts surrounding the issuance of a personal property tax assessment against Monex Corporation. The documents attached to the March 10, 1994 "appeal" were exclusively related to the personal property tax assessment.

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At the May 12, 1995, hearing counsel for Appellant stated that Appellant "withdraws" and "dismisses" the March 10 appeal insofar as it purports to be an appeal from any personal property tax final order against Monex Corporation. We thus consider this question moot. It would appear in any case that any final order considering a personal property tax assessment against Monex Corporation was rendered long before thirty days prior to the "appeal" in any event.

The question thus arises, and the parties briefed the question, whether the March 10 "appeal" was an appeal from the February 2, 1994 final determination on remand of the Tax Commissioner in the sales tax case against Monex Corporation.

The first problem with such an argument is that, if the March 10, 1994 "appeal" was an attempt to appeal the February 2, 1994 final determination on remand, it was not timely filed. Such is required. The appeal must be filed with the Board of Tax Appeals and with the Tax Commissioner within thirty days of service of the Tax Commissioner's final order. See R.C. 5717.02 and Akron Standard Division v. Lindley (1984), 11 Ohio St. 3d 10. Attached to the certification of the Tax Commissioner, filed May 11, 1995, and admitted into evidence at the hearing on the motion to dismiss, was a copy of the certified receipt card for delivery of the final order on remand upon Monex

Corporation. That card indicates it was signed for on February 5, 1994, by a "? Skuratowicz ." The card was addressed to Monex Corporation c/o Mr. John Skuratowicz, at 5617 Linworth Road, Columbus, Ohio 43235." Although the documents in the instant appeal give Appellant's address as 5051 North High Street, Columbus, the Linworth Road address was one used by Appellant throughout the lengthy progress of 87-H-976 and appellant makes no allegation that he ever informed the Tax Commissioner of a new address. At the May 12, 1995 hearing, Appellant alleges it is not his signature on the certified receipt card. He does not allege the signature (which appears to the Attorney Examiner as similar to Appellant's) is not that of a family member. Service upon a family member or other resident at a proper residence satisfies the requirements of service by certified mail. Castellano v. Kosydar (1975), 42 Ohio St. 2d 107; Mitchell v. Mitchell (1980), 64 Ohio St. 2d 49.

And, moreover, Appellant's "amended appeal" to the Board of Tax Appeals in 94-H-266, (discussed infra), was served on the Tax Commissioner on November 22, 1994, seven months later, giving as Appellant's address the Linworth Road address. We are thus forced to conclude that the service of the Tax Commissioner's final order on remand in the sales tax case was proper and that, even had the March 10, 1994 "appeal" been an attempt to appeal that final determination, it was untimely. Appellee also alleges that for this purpose the March 10 "appeal" was defective

for failure to specify errors. We need not decide this question.

As indicated, on November 22, 1994, Appellant filed with the Board of Tax Appeals a document entitled "amended appeal" which listed three case numbers, 94-H-266, 93-1652 and 87-H-976. (We have no idea where Appellant came up with 93-1652). It is clear from the decisions that nothing in the "amended appeal" can correct jurisdictional defects or supply omissions in the original appeal filed on March 10, 1994.

The second problem with considering 94-H-266 as an appeal of the final determination remand against Monex Corporation is that Appellant is clearly appealing individually and not on behalf of Monex Corporation.

We thus determine that Appellant's appeal, 94-H-266, on March 10, 1994 should be and must be dismissed. It was not filed within thirty days of the final order from which (Appellant now determines) Mr. Skuratowicz was appealing, and it was an individual appeal and not on behalf of Monex Corporation.

Attached to the "amended appeal" were two final determinations dated October 31, 1994, in which the Tax Commissioner rendered assessments against John S. Skuratowicz as a responsible corporate officer under R.C.

5739.33 of Monex Corporation. The next question with which we are faced is whether the "amended appeal" is a proper appeal from these final determinations. The parties were also asked to and did brief this question as well.

We consider that the "amended appeal" filed November 22, 1994, did properly appeal the two final determinations dated October 31, 1994, wherein Appellant was determined to be a responsible officer of Monex Corporation. It was obviously timely, and we believe the attachment of the October 31 final orders and the mention of the officer liability cases in the "memorandum" attached to the "amended appeal" (see paragraph 4) satisfies the specificity requirements of Moraine Hts. Baptist Church v. Kinney, Supra and Queen City Valves, Inc. v. Peck, Supra.

It is thus our determination that our case number 94-H-266 should be dismissed. The appeal (denominated "amended appeal") of the two October 31, 1994 final determinations of the Tax Commissioner (Assessment numbers 87601084 and 87601101) wherein Appellant was held liable as a responsible corporate officer of Monex Corporation is not an appeal of any personal property tax assessment against Appellant or Monex Corporation and it is not an appeal of the underlying sales tax assessment against Monex Corporation. It is instead an appeal of the two corporate officers assessments upon which jurisdiction is retained; and it will be assigned a new case number.

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IT IS ORDERED that the captioned appeal docketed as Case No. 94-H-266 is dismissed.

IT IS FURTHER ORDERED that the documents entitled "amended appeal" filed November 22, 1994, be deemed to be an appeal of two assessments issued by the Tax Commissioner, on October 31, 1994 against Appellant as a responsible corporate officer of Monex Corporation; and such appeal shall be designated Case No. 94-H-1510 upon the records of the board, and captioned John S. Skuratowicz, a responsible officer of Monex Corporation, Appellant vs. Roger W. Tracy,, Tax Commissioner of Ohio, Appellee.

I hereby certify the foregoing to be a true
And correct copy of the action of the Board
Of Tax Appeals of the State of Ohio, this day
taken, with respect to the above matter.

s/Kienner Johnson
Chairman